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Eighth Circuit Senior **Judge Richard Arnold** passed away September 23 in Rochester, Minnesota, from complications related to treatment for lymphoma. Services followed the next week in Little Rock, Arkansas, where Judge Arnold had maintained his Eighth Circuit chambers.

Judge Arnold **served** with the Eighth Circuit **nearly 25 years**, having been appointed to the Court by President Jimmy Carter in February 1980. He served as Chief Judge from January 1992 through April 1998 before taking senior status in April 2001.

Judge Arnold, who was 68, had a **national reputation** as a **jurist** and **scholar**, as reflected in the numerous obituaries and remembrances posted on various Internet news and legal sites upon the announcement of Judge Arnold's death.

Former president Bill Clinton and eight of the current U.S. Supreme Court justices reportedly were among those issuing statements, describing Judge Arnold variously as a "brilliant, brilliant man . . . a model of humility and self-deprecation" (Justice Thomas), who wrote opinions that were "models of the art of judging" (Justice Scalia), and who was "unyielding" in "his search for truth and justice" (Justice Kennedy).

Judge Arnold's signature attire, well-known to Eighth Circuit practitioners and personnel, was a **bow tie**; and Judge Arnold occasionally brought formal attire to court week if he was going to have a chance to take in an opera. An ensemble of 36 string players from the Arkansas Symphony reportedly played at Judge Arnold's funeral.

A former law clerk, quoted on one web site, described Judge Arnold as having "a certain presence about him that was awe inspiring" but as also having a "rich sense of humor."

Judge Arnold's cousin, lawyer Thomas Arnold, is quoted as telling how Judge Arnold as a youngster was reputed to have spent his spare time reading the Encyclopedia Britannica – but that most people thought he instead wrote it.

Judge Arnold's golfing partners over the years reportedly included President Clinton and U.S. Supreme Court Justice John Paul Stevens.

Judge Arnold was a **native** of **Texarkana**, Arkansas, who studied classics at Yale before **graduating first** in his class – ahead of U.S. Supreme Court Justice Antonin Scalia – at Harvard Law School. Judge Arnold then served as a **law clerk** to U.S. Supreme Court Justice William **Brennan** before joining a major Washington, D.C., firm for three years.

In 1964, Judge Arnold returned to Texarkana to join the family law firm. Judge Arnold's father and grandfather were both lawyers, as is Judge Arnold's brother, Morris, who in 1992 joined Judge Arnold on the Eighth Circuit bench.

While in practice in Texarkana, Judge Arnold served as a delegate to the Seventh Arkansas Constitutional Convention. In 1973 he became legislative secretary to Arkansas Governor Dale Bumpers, and he stayed with Bumpers as a legislative assistant when Bumpers subsequently became a U.S. Senator.

Judge Arnold reportedly was once recommended to President Richard Nixon as a possible U.S. Supreme Court nominee.

In 1978, President Carter appointed Judge Arnold to the **U.S. District Court** in Arkansas, where Judge Arnold served until his elevation to the Eighth Circuit.

While with the Eighth Circuit, Judge Arnold served 10 years as head of the budget committee of the U.S. Judicial Conference, gaining recognition for his work in the improvement of judicial administration.

Judge Arnold's battle with cancer covered a number of years, dating back to the 1970s. President Bill Clinton reportedly expressly states in his new autobiography that he would have appointed Judge Arnold to the U.S. Supreme Court but for the questions about Judge Arnold's health.

Among his many **honors**, Judge Arnold in 1998 received the Edward J. Devitt Distinguished Service to Justice Award of the American Judicature Society, and this year he received only the second lifetime achievement award ever presented by Scribes, the American Society of Writers on Legal Subjects. Also, the **Annex** to the U.S. Courthouse in Little Rock, currently under construction, was **named after Judge Arnold** in a dedication ceremony at the time of groundbreaking.

A transcript of the Devitt award ceremony appears in the front of 213 F.3d and contains additional details about Judge Arnold's career to that point.

In a particularly prominent recent opinion, Judge Arnold called attention to the **issue** of **unpublished** appellate court **opinions**, holding in a subsequently vacated Eighth Circuit panel decision that a court may not constitutionally refuse to accord precedential value to its unpublished opinions. *See Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot by* 235 F.3d 1054 (8th Cir. 2000)(en banc).

Web sites consulted in preparing this article, in addition to federal judicial web sites, include the web sites of the Arkansas Democrat-Gazette, Texarkana Gazette, KATV, Cleveland Plain Dealer, Arizona Republic, New York Lawyer, and First Amendment Center. Portions of the information

found on some of those web sites was attributed to third-party sources such as the Associated Press and New York Times.

Emory University law professor Polly Price, a former law clerk to Judge Arnold, reportedly is writing a biography of the Judge.

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Things Eighth Circuit judges don't like in briefs include "childish bickering" by counsel, disrespectful comments about district judges – and footnotes. Judge Roger Wollman, and Senior Judges Pasco Bowman and David Hansen offered these tips, and more, in a panel presentation September 13 in St. Louis as part of the Fifth Annual Eighth Circuit Appellate Practice Institute.

Judge Bowman estimated that 80 to 90 percent of the time a judge develops a specific view of a case based on the briefs, with oral argument just confirming that view. Nevertheless, Judge Bowman said, a lot of briefs have a "slap dash" quality to them.

Judge Wollman suggested that counsel in writing a brief should get to the point, use active verbs, and not bore the Court, but also should not assume the Court has extensive knowledge in any particular specialized area. He said that some briefs are "torture" to read – but acknowledged that counsel might say the same thing about some of the Court's opinions.

Judge Bowman agreed with Judge Wollman that the grammar used by counsel in briefs is "slipping" compared to what they saw during their first years on the Court. Judge Hansen embraced the common suggestion that counsel after drafting a brief should let the brief "rest" for a few days before working on it further.

When a brief is bad, however, Judge Bowman said that counsel has a greater chance to influence the Court through oral argument.

Judge Wollman suggested that counsel approach **oral argument** by attempting to identify what a generalist judge would find most troubling about the case. He characterized oral argument ideally as being a "conversation" between Court and counsel.

Judge Hansen cautioned against spending too much argument time on a recitation of the facts.

None of the three judges particularly endorsed the use of “power point” technology during oral argument, and Judge Hansen in fact said that that technology is used “too often” and is “never used well.”

Judge Hansen suggested that **visual aids**, such as enlargements of important language, can be helpful at oral argument; however, Judge Bowman cautioned that judges may find it difficult to read such enlargements from the bench. Judge Wollman added that enlargements and visual aids can be distracting and that a particular panel would have discretion to refuse to allow counsel to use such materials.

Counsel may offer each judge on the argument panel a copy of an exhibit, for example with language highlighted, to refer to on the bench, but should offer the copies to the court attendant in advance and should also provide a copy to opposing counsel.

For cases that will be argued, the judges receive copies of the briefs about five weeks before oral argument. This, the judges explained, limits the willingness of the Court to **re-schedule** an **argument** date, because the judges may have already put in work on the case and it may be difficult to get the same three judges together as a panel other than at the time originally scheduled.

Judges Wollman and Bowman said that they start their review of a particular case by reading the district court opinion. Judge Hansen, in contrast, starts by reading the “screening sheets” prepared by the clerk’s office. He then reads the appellant’s statement of the issues before moving to the district court opinion. Judge Hansen noted that the screening sheets are prepared by Clerk of Court Michael Gans or a senior staff attorney and contain summaries of the cases, but no recommendations regarding disposition.

Both Judge Wollman and Judge Hansen have their law clerks prepare bench memos in some cases, but only when the appeal involves particularly difficult issues and/or an area of the law new to the judge.

The judges before oral argument read the most important cases cited in the briefs. The

judges, however, rarely confer about a case before oral argument and in particular have a “rule” against discussing a case other than in the presence of all members of the argument panel.

The judges do not receive or review preliminary appeal filings such as motions for extension of time.

For the benefit of criminal defense lawyers, the judges discussed generally the handling of **Anders briefs**. Such briefs go initially to Eighth Circuit staff attorneys, who independently review the record for possible missed arguments. A panel of Eighth Circuit judges then reviews the staff attorney recommendation and takes appropriate action, usually without requiring oral argument.

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U.S. Supreme Court Justice Antonin **Scalia** on October 1 presented the first annual **Arnold Lecture** at the William H. Bowen School of Law of the University of Arkansas at Little Rock.

The lecture series **honors** the **late Honorable Richard S. Arnold**, former Eighth Circuit Judge, Chief Judge and Senior Judge, and his brother, **Eighth Circuit Judge Morris S. Arnold**. The Arnolds served together on the Court for more than 12 years.

Justice Scalia, who was a classmate of Judge Richard Arnold at Harvard Law School, praised the late Judge as a jurist of brilliant intellect and man of greater compassion.

In his address before a full courtroom, Justice Scalia argued for his preference that decisions of moral consequence be resolved by the people through their elected legislatures than by judges.

The Arnold families, former clerks to Richard and Morris Arnold, and the leading judges and political figures in Little Rock and Arkansas were among those in attendance.

Time, Place & Manner

Eighth Circuit practitioners who anticipate appearing before other U.S. Courts of Appeals may want to become admitted in those circuits before the end of the year. According to Eighth Circuit Clerk

of Courts Michael Gans, a **nationally imposed \$150 appellate membership fee** will go into effect **January 1, 2005**. Moreover, attorneys will be required to pay this fee separately for each circuit to which they seek admission.

Attorneys also will still have to pay each circuit's individual, locally set admission fee. In other words, after January 1 an attorney seeking admission to practice before the Eighth Circuit will have to pay \$190, regardless of whether or not the practitioner has paid the \$150 "national" fee in becoming admitted in some other circuit.

Attorneys already admitted to practice before the Eighth Circuit and/or other circuits will not have to pay the fee to continue to practice before those circuits in which they are already admitted.

The Judicial Conference of the United States adopted the new admission fee at its September 2004 meeting. The fee will become part of the Court of Appeals Miscellaneous Fee Schedule.

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Two major changes in Eighth Circuit operations – one temporary and one permanent – may be expected within the next 12 to 15 months, according to Clerk of Courts Michael Gans.

First, the Eighth Circuit **after June 2005 will temporarily stop sitting in St. Paul** while the courthouse there undergoes extensive remodeling to meet district court needs. Arguments normally held in St. Paul will be held in St. Louis, and occasionally in other major cities within the Circuit such as Omaha and Kansas City. The St. Paul clerk's office will remain open but may have to relocate outside the courthouse.

Gans said the remodeling is expected to affect Eighth Circuit argument schedules for up to two years.

Second, **electronic filing** is likely to be implemented in all U.S. Circuit Courts of Appeals, on either a mandatory or optional basis, by late 2005 or early 2006.

Gans noted that the Eighth Circuit would be hosting a special conference on electronic filing and case management issues specific to appellate courts.

(That conference has since been held and is reported elsewhere in this newsletter.)

Gans shared the news of the courthouse remodeling and progress toward electronic filing as part of a presentation at the Fifth Annual Eighth Circuit Appellate Practice Institute September 13-14 in St. Louis.

Gans in his presentation also offered practitioners a variety of **practical tips** regarding Eighth Circuit practice. For example, Gans noted that the Eighth Circuit is reluctant to grant attorney motions to withdraw on appeal from appointed criminal representations.

In addition, Gans revealed that he now grants **fewer** motions for **overlength briefs**. He pointed out that the 14,000 "word count" limit allows for briefs longer than the prior limit of 50 pages and said that the Eighth Circuit judges generally believe the "word count" limit is too generous.

On the ever-popular topic of motions for **extension of time**, Gans stated that first extensions of two weeks in criminal cases and two to three weeks in civil cases are routinely granted by deputies in the clerk's office. He noted that counsel may seek an extension through a letter, rather than a formal motion, but should include in the letter the current deadline and the amount of additional time needed and should give some reason for the extension.

Gans personally rules on second motions for extension, and any such extensions granted will be shorter.

Gans noted that the clerk's office receives approximately 60 motions for extension of time each week and suggested that absent a consistent pattern of delay in the particular case, an attorney should think carefully before objecting to an opposing counsel's motion for extension of time.

Moreover, Gans emphasized the need for counsel to file a motion rather than merely ignoring a deadline. If counsel in a criminal case neither timely files a brief nor seeks an extension, Gans said, counsel is asked to show cause why the Court should not impose discipline. If counsel in a civil case neither timely files a brief nor seeks an extension, counsel is asked to show cause why the Court should not dismiss the appeal.

On the subject of **appendix preparation** in civil cases, Gans said that the “joint appendix” and “separate appendix” options are used about equally and that the Court has no particular preference. Gans said that use of the “deferred appendix” option, however, is discouraged. Gans noted that under Local Rule 10A, parties are now required to submit an appendix containing all exhibits.

Gans advised counsel to jointly call the clerk’s office for instructions when faced with circumstances not specifically addressed by the Rules, as when review of the transcript is necessary to the issues on appeal and portions of the trial – such as depositions read into the record or shown by video – are not included in the transcript.

Gans also called the attention of counsel to the option of including a limited number of important items, such as excerpts from important documents, in the **addendum** permitted for opening briefs. Gans pointed out that judges read briefs everywhere (for example, while traveling) but may not carry the appendices with them.

In discussing **briefs**, Gans advised counsel to limit the use of italics and boldface because judges see such emphasis as “shouting” at them. Gans also suggested that counsel if possible use body type with serifs and the corresponding word-count option regarding permissible brief length. Gans, however, reminded counsel that footnotes must appear in the same size type as the body of the brief and must be included in the word count.

Gans noted that the “VIA” electronic noticing system and the fax filing of certain documents both have been welcome innovations from the perspective of the clerk’s office.

Gans commented that he answers his own phone at the clerk’s office and talks to 50 to 60 attorneys each week.

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“**Resistance is futile**” was the theme at the Eighth Circuit Conference on Appellate **Case Management/Electronic Case Files** (“CM/ECF”) held September 28-29 in St. Louis.

Conference leaders, however, emphasized that **many questions remain** to be decided with regard to the potential implementation of appellate

CM/ECF and that Eighth Circuit judges and staff will be able to greatly influence not just whether, but also how and to what extent, the Circuit uses the technology.

Conference participants included representatives of all Eighth Circuit constituencies with a stake in the use of CM/ECF, including Eighth Circuit judges and their secretaries and law clerks, Eighth Circuit clerk’s office personnel, administrators and staff attorneys, district court judges, staff and clerk’s office personnel, bankruptcy appellate panel judges and other bankruptcy court personnel, and Eighth Circuit practitioners from government, private practice and public defender’s offices.

Additional participants included representatives from the U.S. Courts Administrative Office and the U.S. Supreme Court and judges and clerk’s office personnel from other circuits.

The conference was jointly sponsored by the Eighth Circuit and the Federal Judicial Center, which is the research and education arm of the federal judiciary. The conference will not be repeated in other circuits; rather, ideas and insights from the Eighth Circuit Conference will be made available to those circuits for use in implementing CM/ECF.

According to Eighth Circuit Clerk of Court Michael Gans, the hardware and software for CM/ECF will be available to the circuits by the end of the year. The **Eighth Circuit CM/ECF implementation committee**, chaired by Judge Diana Murphy, is expected to present **proposals and recommendations** to the Eighth Circuit Judicial Council at its meeting in **January 2005**.

The possible presence on the Court of some technology-resistant judges is not expected to be a barrier to implementation of CM/ECF, because the judges’ individual desires can be accommodated and the judges will recognize the benefits to their staff and the court from CM/ECF.

The essence of CM/ECF is the electronic, rather than paper, storage of case files. Such a system not only saves space but promotes file integrity and security and allows simultaneous access to files. In addition, a variety of reports can be easily generated for court use.

Neither mandatory, nor even any, electronic filing by attorneys is necessary to electronic case management if the clerk's office scans documents received into the system. For example, even with mandatory electronic filing district court clerk's offices generally receive on paper and scan pro se filings – and they report that this can actually result in more legible copies for judges and law clerks to work with.

Moreover, electronically stored documents can always be printed out for use; the question is at what point in the process they can most economically be printed, if desired, and who will bear the cost.

Many of the benefits of CM/ECF potentially would be felt most directly by staff involved in boxing up and mailing records and papers: district courts would be able to send dockets and other materials electronically to the Eighth Circuit, and the Eighth Circuit clerk's office and chambers staff would be able to send and return briefs and other papers the same way.

Chief Judge James Loken even proposed that the use of CM/ECF might allow the Court to dispense with the requirement for preparation of paper appendices, with counsel still being required to file designations identifying the most important record items.

Another suggestion was for a reduction in the number of copies of paper briefs filed by the parties, with additional copies to be printed from the electronic file if and when en banc hearing were granted.

Representatives of district courts that have already implemented CM/ECF reported favorably on their experiences. For example, one district court said that it went from optional to mandatory electronic filing because the judges were so enthusiastic about the system. Paper costs for the district did not increase, even though some judges and other court users were printing out some documents, such as long briefs.

Another district court reported decreases in postage and operating costs.

Conference participants, in addition to discussing the benefits of CM/ECF, also tried to identify issues and problems that would need to be addressed. These issues and problems included, for

example, a possible system failure when an attorney was trying to file a brief, a possible lack of access by some attorneys to electronic filing technology, payment of court reporters if electronic transcripts replace paper transcripts, and training needs of the court and bar.

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The Eighth Circuit on September 27 issued an **administrative order** aimed at ensuring the orderly and efficient presentation and resolution of arguments invoking the U.S. Supreme Court's June 2004 decision in *Blakely v. United States* (124 S. Ct. 2531).

As discussed in more detail in an article in the August 2004 Association newsletter (available on the Association web site), the *Blakely* decision raises doubt as to the constitutionality of the federal sentencing guidelines.

The U.S. Supreme Court is expected to decide that issue, and the issue of severability of any unconstitutional provisions (and thus how federal judges should determine sentences), in a pair of cases expedited and argued October 4 – i.e., the first day of the Supreme Court's new term.

The Eighth Circuit has already granted rehearing en banc in two cases involving *Blakely* issues; however, arguments in those cases are “on hold” until the Supreme Court rules.

The Eighth Circuit administrative order affects criminal cases on direct appeal and basically provides that briefing in those cases should proceed as normal. **Requests for stays or other delays** pending the Supreme Court's rulings will **not be granted**.

Counsel, however, may file motions for leave to submit **supplemental briefs** on *Blakely* issues; and after the Supreme Court rules, the Eighth Circuit decision panels will determine whether or not to permit supplemental briefing in any particular case.

Likewise, time limits for **rehearing petitions** will not be extended. **Blakely issues** should be **noted** in such petitions but **not argued**, and supplemental petitions on *Blakely* issues then may be filed within 14 days of the Supreme Court's ruling. The Eighth Circuit will not, until the

Supreme Court rules, reconsider the *Blakely* portion of any ruling.

Finally, the Eighth Circuit generally will hold mandates in all criminal cases during this time, except that counsel can, by motion, ask to have mandate issued in whole or in part.

The two cases before the U.S. Supreme Court are *United States v. Booker*, 375 F.3d 508 (7th Cir.) (2 to 1 decision), and *United States v. Fanfan*, (D. Me.) (ruling from the bench); and in each case the court held that under *Blakely* the federal sentencing guidelines were unconstitutional insofar as they allowed factfinding by judges in sentencing.

The two cases already accepted by the Eighth Circuit for rehearing en banc are *United States v. Mooney* (No. 02-3388, July 23, 2004) (2 to 1 decision), and *United States v. Pirani* (No. 03-2871, Aug. 5, 2004) (dissent based on lack of plain error). Again the Court in each case found a constitutional problem with the application of the federal sentencing guidelines, with the panel in *Pirani* believing it was bound by *Mooney* but also offering its own analysis of the *Blakely* issue.

For a copy of the Eighth Circuit administrative order, visit the Eighth Circuit web site at www.ca8.uscourts.gov and click on the link on the home page.

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The Eighth Circuit will sit outside its normal St. Louis and St. Paul venues three times in the coming months.

First, three panels will **hear cases in Kansas City** on the morning of October 2004. The presentation of the portrait of Senior Judge Pasco Bowman is scheduled for that afternoon but is invitation only, due to space limitations.

Second, a panel consisting of Judges William Riley, Michael Melloy and Steven Colloton will hear three cases at **Drake University** in Des Moines, Iowa, on the afternoon of November 4.

Third, a panel of judges will hear several cases at **St. Louis University** on November 18, during November court week.

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The **Judicial Conference** of the United States at its September meeting **approved** each of the pending **amendments** to the Federal **Rules of Appellate Procedure** forwarded to it in June by the Committee on Rules of Practice and Procedure.

The amendments in question involve Rules 4, 26, 27, 28, 32, 34, 35, 45 and proposed new Rule 28.1. These amendments, if adopted, would expand and combine provisions relating to cross-appeals, clarify the conditions for reopening the time for appeal, extend the typeface and type-style requirements for briefs to motions, and impose a uniform method to be used by all circuits in determining when a majority exists for the purpose of granting en banc hearing.

The proposed new rule regarding citation of unpublished opinions was previously referred by the Committee on Rules back to the Appellate Rules Advisory Committee and thus was not among the group of amendments forwarded to and approved by the Judicial Conference.

The amendments approved by the Judicial Conference **next** will be **considered** by the U.S. **Supreme Court**. The potential effective date for these amendments is December 1, 2005.

Association News

More than one hundred Association members and other Eighth Circuit practitioners recently attended **continuing legal education** presentations and **mingled with Eighth Circuit judges** and other court personnel at the Fifth Annual Eighth Circuit Appellate Practice Institute.

The event, held September 13-14 in St. Louis, was **co-sponsored by the Association** and the Journal of Appellate Practice and Process.

Tom Sullivan, an Association director and founder and senior editor of the Journal, said the 114 paid registrations was the highest total ever for the Institute. The Journal was the founding sponsor for the Institute, with the Association joining as co-sponsor last year.

Nearly 65 percent of Institute registrants were from outside the St. Louis area, with registrants coming from as far away as Phoenix and Denver.

Highlights of the program included an Eighth Circuit update and procedural tips from **Clerk of Court Michael Gans** and argument and briefing tips from a **panel** made up of **Judge** Roger Wollman and **Senior Judges** Pasco Bowman and David Hansen. (See reports elsewhere in this newsletter.)

New Eighth Circuit Judge Duane Benton, Chief Judge James Loken, Judges Morris Arnold and William Riley, and Senior Judges Donald Lay and Arlen Beam were among the additional judges and court personnel joining Institute participants and attendees for a reception.

The featured national speaker for the Institute, former deputy U.S. solicitor general Andrew Frey, gave attendees tips on seeking and resisting petitions for certiorari. He directed attorneys to additional aids posted on his web site at www.appellate.net.

Another speaker, associate professor Coleen Barger of the William H. Bowen School of Law of the University of Arkansas at Little Rock, highlighted the potential hazards for attorneys and courts in citing to materials on Internet. Barger noted that according to her study of Internet citations in the opinions of the U.S. Supreme Court and Courts of Appeals, around 40 percent of citations used are now "inaccurate" because the material cited to has been either removed from the web site in question or moved to another portion of the site.

David Herr, Association director and chair of the programs committee, noted that lawyers always like to hear Eighth Circuit judges talk about lawyering and said that the panel that appeared on this program was particularly well received. He added that the lawyers and Eighth Circuit judges both seemed to appreciate the opportunity to mingle at the reception.

Additional **sponsors** for the **reception** were the law firms of Armstrong Teasdale, LLP; Fraser Stryker Meusey Olson Boyer & Bloch, P.C.; Maslon Edelman Borman & Brand, LLP; and Woods & Aitken, LLP.

Association members received a **\$25 discount** on the enrollment fee for the Institute.

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Association **members** enjoyed a **dinner** with members of the **Court** on August 25 in **Omaha**. Approximately sixty people, including six judges, their staffs and spouses, enjoyed a dinner at Rick's Café Boatyard located on the newly constructed Riverfront area in Omaha.

Judges present were Chief Judge James B. Loken, Judges Kermit E. Bye, Roger L. Wollman and William J. Riley, and Senior Judges C. Arlen Beam and Donald P. Lay. Judge Riley briefly addressed the gathering, presenting a short biography of each of the Judges. Local members of the Association note that it was a great opportunity for all to meet and talk on an informal basis with the Judges, both during the cocktail hour and during dinner.

One of the highlights of the evening was the group singing of "Happy Birthday" to Judge Donald P. Lay on his 78th birthday. The song was led by Association member Steve Davidson, a talented singer. A good time was had by all.

Incidental costs of the event were **underwritten** by the Association, as well as by gifts from the following Omaha and Lincoln **law firms**: Fraser Stryker; Woods & Aitken; Fitzgerald, Schorr, Barmettler & Brennan; Baird Holm; and Gross & Welch. Association board members Krista Kester and Bob Rossiter coordinated the event.

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If you have not yet **renewed** your **membership**, this may be the last newsletter issue you receive.

The Association's membership year runs from July 1 through June 30, and all dues-paying members who joined before October 1, 2003, needed to renew as of July 1, 2004.

The six-month **grace period** for membership renewal will **expire** at the end of December.

A membership renewal form is available on the Association web site at www.law.ualr.edu/eighthcircuitbar.

To check your membership status, contact membership committee chair Mark Marshall at mmarshall@dehs.com.

Issues on Appeal

The Eighth Circuit in a recent **en banc** decision unanimously **overruled** existing Circuit precedent regarding the **maximum** permissible **penalty**, under 18 U.S.C. §3583(e)(3) & (h), for a **violation** of conditions of **supervised relief**. *United States v. Palmer*, 380 F.3d 395, overruling *United States v. St. John*, 92 F.3d 761 (1996).

Congress amended §3583 in 1994, and the Court en banc concluded that pursuant to the plain meaning of the statute as amended, the penalty for violation of supervised release is limited only by the maximum term of supervised release allowed under the statute for the underlying offense, and is not limited by the term of supervised release initially imposed.

The Court noted that the panel in *St. John*, in ruling to the contrary, was worried about possible constitutional ex post facto issues which have since been resolved by the U.S. Supreme Court's decision that the amendment to §3583(h) does not apply retroactively.

The panel in *Palmer* had issued an unpublished *per curiam* decision applying *St. John*.

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The Eighth Circuit, after hearing three cases en banc in St. Louis during September court week, will hear **three** more **cases en banc** in St. Paul during **October** court week.

The first case, *Doran v. Eckold*, 362 F.3d 1047, involves a substantial monetary judgment entered in favor of an individual who was shot when police, in executing a search warrant, entered his residence without following the “knock and announce” rule. The panel rejected various challenges to the judgment, finding in particular that the police failed to adequately investigate the alleged presence of guns and a methamphetamine lab before deciding to use a “no knock” entry. Chief Judge James Loken in dissent argued that majority's “exigent circumstances” analysis failed to focus on the knowledge specifically of the two officers held individually liable and that those individuals were entitled to rely, respectively, on the facts shown on the face of the warrant and on

directions from a superior to use a “no knock” approach.

The second case, *Terrell v. Larson*, 371 F.3d 418, likewise involves a civil action against police, based this time on a crash between a vehicle driven by an ordinary citizen and a police vehicle responding to a domestic disturbance call. The panel, on interlocutory appeal, affirmed the denial of qualified immunity to the officer driving the police vehicle, holding that the jury could find “deliberate indifference,” and thus a substantive due process violation, because the officer knew that the call was already covered and had been told his presence was not needed. Chief Judge James Loken, dissenting in part, argued for application of the “intent to harm” standard for police pursuit of suspects and further argued that the officer's conduct in any event did not “shock the conscience” under the circumstances.

The third case, *Republican Party v. White*, 361 F.3d 1035, involves the application, on remand, of a U.S. Supreme Court decision (see 536 U.S. 765 (2002)) invalidating a Minnesota judicial ethics canon insofar as the canon prohibits candidates for elective judicial office from announcing their views on disputed legal or political issues. The panel reconsidered two additional limitations on Minnesota judicial candidate speech, upholding the canon's limitations on solicitation of funds but remanding for further proceedings regarding the canon's ban on judicial candidate appearances at partisan political events. Senior Judge Arlen Beam, in dissent, argued that all three challenged portions of the canon were unconstitutional.

The Eighth Circuit panel, with Judge Beam in dissent, had initially upheld all three of the challenged limitations. See 247 F.3d 854.

Footnotes

The **Eighth Circuit** to date has been the **least adventuresome** among the federal circuits in **citing Internet materials in its decisions**, according to Coleen Barger, associate professor of law at the William H. Bowen School of Law of the University of Arkansas at Little Rock.

Barger, speaking at the Fifth Annual Eighth Circuit Appellate Practice Institute (see article

elsewhere in this newsletter), said that the Eighth Circuit as of September 7, 2004, had used the fewest total Internet citations of any federal appellate court.

The Ninth Circuit, according to Barger, is the leader in Internet citations, perhaps at least in part because of the volume of opinions that circuit issues. The U.S. Supreme Court, Barger said, is fifth.

The first federal appellate court to cite to the Internet in a decision, according to Barger, was the U.S. Supreme Court in 1996, in an opinion by Justice David H. Souter. She said the Eighth Circuit cited to the Internet in a decision for the first time in 1998.

The Eighth Circuit so far this year, according to Barger, has cited to Internet sources a total of ten times, with those citations appearing in seven different decisions.

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This **newsletter** is compiled by the communications committee of the Association of the Bar of the United States Court of Appeals for the Eighth Circuit. **Special thanks** this issue to Tom Sullivan of Little Rock for the Arnold Lecture report. Comments and suggestions should be addressed to committee chair Margaret Callahan (mccallahan@belinlaw.com) or vice-chair Annamary Dougherty (adougherty@cgwg.com). The committee would welcome additional members and/or occasional contributors.